STATE OF MICHIGAN

COURT OF APPEALS

BRIDGET GARWOOD, Plaintiff-Appellant,	UNPUBLISHED September 9, 2014
v	No. 314360 Macomb Circuit Court
BAKER COLLEGE OF CLINTON TOWNSHIP and ANNE VIVIANO, Defendants-Appellees.	LC No. 2011-001661-CZ

Before: METER, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

Plaintiff, Bridget Garwood, appeals as of right from an order granting summary disposition in favor of defendants, Anne Viviano and Baker College, in plaintiff's defamation action. Finding no errors warranting reversal, we affirm.

I. BASIC FACTS

Plaintiff sued defendants after she failed out of Baker College's nursing program. Plaintiff failed Viviano's class and, because it was her third failed class, she was no longer eligible for reentry into the nursing program. Thus, regardless of how plaintiff frames the issue, she was neither dismissed nor disciplined; she was self-dismissed from the nursing program.

Plaintiff takes issue with a number of letters authored by defendant Viviano, who was her clinical instructor. Viviano gave plaintiff her first "write up" on May 12, 2010, following an incident on May 5th:

> On May 5, Bridget G. was assigned two patients. Her assignment was to complete a head to toe assessment on her patients, chart assessments, pass medications on one of her patients and be able to verbalize to instructor pertinent lab values, nursing diagnosis and curative factors.
>
> We arrived on the floor at 11[:]45 and the students are responsible to cover their patient's blood sugars according to their sliding scale. I informed Bridget G. her patient's blood sugar was 247 and we needed to cover it. Bridget G. was writing down information about her patient and asked if she could finish. I told her to finish and get with me as soon as possible. I began to pass medications with the

> other students and at 13[:]15 remembered Bridget had not given her insulin. I found Bridget G and informed her again covering a blood sugar is a priority and she failed to understand the importance of covering patients in a timely manner. Together we passed her 13[:]00 medications and I instructed her to chart what was given and put the medication sheet in the locked pull down cupboard as all the students were instructed to do. Bridget then was assigned to go to lunch. While she was gone I asked another student to get the medication sheet to review, but we were unable to locate it. We finally located the medication sheet on the floor in the patient's room.
>
> When confronted about the medication sheet Bridget G stated it was not her fault as the RN came into the room and placed clean linens on top of it. I then informed Bridget the medication record was her responsibility not the RN's and anyone could have entered that room and read private patient information which is a HIPPA [sic] violation.
>
> Bridget G. is having great difficulty caring for two patients. She has displayed her inability to organize, prioritize and provide SAFE patient care in a timely manner. Her written assessment (Concept Map) is another indication of problems with critical thinking.
>
> At this time Bridget G. is not safe to care for two patients. She experienced difficulty prioritizing and organizing their care, delegating, asking for help and working as a member of the team. Instructor met with Bridget G. and informed her she must perform safely in all aspects of care for the reminder [sic] of the clinical or would not be successful.

On May 20, 2010, Viviano put forth a plan of action:

> For the remainder of the clinical rotation Bridget G. will be responsible to safely care for 2-3 patients, as the other students. The care includes a complete assessment, charting and passing medications on 1-2 of her assigned patients. It is expected she be prepared to give her mediations by stating action and any other pertinent information (B/P, heart rate, need to be crushed, tubing changes, etc) needed. The above required actions need to be performed in a timely manner.

However, when plaintiff's performance failed to improve, Viviano issued a May 27, 2010 letter:

> On May 20, I informed Bridget G. her performance in clinical must meet the stated requirements we agreed upon. We discussed and Bridget was aware what she needed to do to be successful.
>
> In pre-conference on the same day the students were instructed to turn in to me their assessments and charting in post conference. After reviewing Bridget G.['s] I found her assessment to be:
>
> a) Incomplete

> b) 2 out of 3 of her patients had no charting at all
>
> c) Patient identifiers on assessments (we had discussed HIPPA [sic] previously)
>
> d) Bridget had the opportunity to push pain medication on one of her patients, but her assessment did not reflect that pain had been assessed at all or the effectiveness of the medication documented (A fundamental assessment)
>
> e) If unsure, no questions were asked.
>
> f) Safe patient care cannot be achieved when assessments are not done or [are] incomplete.
>
> Bridget is more than capable of performing tasks but is not meeting Objective 1 as evidence[d] by her inability as a 4th Term student to apply critical thinking skills and problem solving methods for decision making within the context of the nursing process. She continues to display a lack of organization, inability to prioritize or provide SAFE patient care.
>
> At this time Bridget G. is not safe to care for patients and will not be able to continue with the clinical rotation at Select. I instructed her to follow up with Karen G.

Plaintiff unsuccessfully appealed her grade through Baker's administrative process. Thereafter, plaintiff filed a complaint against defendants, alleging violations of 42 USC § 1983, tortious interference with a business relation or opportunity, slander/defamation, invasion of privacy, and civil conspiracy. Plaintiff sought monetary damages and injunctive relief. She demanded to be reinstated in the nursing program and allowed to retake the clinical with an "unbiased instructor" or, alternatively, demanded a refund of her $60,000 tuition. All of plaintiff's claims were dismissed following a number of pretrial motions. She now appeals as of right.

II. DEFAMATION

Plaintiff first argues that the trial court erred in granting defendants summary disposition on her defamation claim. We disagree.

"This Court reviews a trial court's decision regarding a motion for summary disposition de novo. A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. A motion for summary disposition under MCR 2.116(C)(10) should be granted if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact." *Gividen v Bristol West Ins Co*, ___ Mich App ___; ___ NW2d ___ (Docket Nos. 312082, 312129, issued June 17, 2014), slip op, pp 2-3 (internal citations omitted).

Whether a statement is capable of defamatory meaning is a matter of law that may be decided by summary disposition. *Kevorkian v American Med Ass'n*, 237 Mich App 1, 9; 602 NW2d 233 (1999). "The determination whether a privilege exists is one of law for the court." *Prysak v RL Polk Co*, 193 Mich App 1, 14-15; 483 NW2d 629 (1992). Whether the evidence is sufficient to support a finding of actual malice is also a question of law. *Tomkiewicz v Detroit News, Inc*, 246 Mich App 662, 677; 635 NW2d 36 (2001).

"A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 113; 793 NW2d 533, reh den 488 Mich 860 (2010) (internal quotation marks omitted). "In Michigan, the four basic elements of a defamation claim are as follows: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication." *Ghanam v Does*, 303 Mich App 522, 544; 845 NW2d 128 (2014) (internal quotation marks omitted).

"In order for a statement to be actionable, the statement must be provable as false." *Mino v Clio School Dist*, 255 Mich App 60, 77; 661 NW2d 586 (2003). Therefore, "[t]ruth is an absolute defense to a defamation claim." *Wilson v Sparrow Health System*, 290 Mich App 149, 155; 799 NW2d 224 (2010). However,

> it is not necessary for defendants to prove that a publication is literally and absolutely accurate in every minute detail. Rather, substantial truth is an absolute defense to a defamation claim. Michigan courts have held that slight inaccuracies of expression are immaterial provided that the defamatory charge is true in substance. It is sufficient for the defendant to justify so much of the defamatory matter as constitutes the sting of the charge, and it is unnecessary to repeat and justify every word so long as the substance of the libelous charge be justified, and the inaccuracy in no way alters the complexion of the affair, and would have no different effect on the reader than that which the literal truth would produce. [*Collins v Detroit Free Press, Inc*, 245 Mich App 27, 33; 627 NW2d 5 (2001) (internal quotation marks and citations omitted).]

In addition to truth acting as a defense to a defamation claim, a defendant may also assert privilege.

> In the common law of defamation, a defense of privilege exists. The defense of privilege is a matter of public policy that some communications are so necessary that, even if defamatory, they should be made. Therefore, the publisher is protected from liability by the privilege defense. Privileged communications may be either absolutely privileged or qualifiedly privileged. The difference between absolute and qualified privileges is that the latter affords the publisher protection only in the absence of ill will, spite, or malice in fact. [*Postill v Booth Newspapers, Inc*, 118 Mich App 608, 619-620; 325 NW2d 511 (1982).]

Qualified privilege "extends to all communications made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, to a person having a corresponding interest or duty." *Bacon v Michigan Central R Co*, 66 Mich 166, 169; 33 NW 181 (1887). "The elements of a qualified privilege are (1) good faith, (2) an interest to be upheld, (3) a statement limited in its scope to this purpose, (4) a proper occasion, and (5) publication in a proper manner and to proper parties only." *Prysak*, 193 Mich App at 15. The defendant in a defamation action has the burden of proving the existence of a qualified privilege. *Lawrence v Fox*, 357 Mich 134, 141; 97 NW2d 719 (1959). "A plaintiff may overcome a qualified privilege only by showing that the statement was made with actual malice, i.e., with *knowledge of its falsity or reckless disregard of the truth*." *Prysak*, 193 Mich App at 15 (emphasis added).

> Reckless disregard for the truth is not established merely by showing that the statements were made with preconceived objectives or insufficient investigation. Furthermore, ill will, spite or even hatred, standing alone, do not amount to actual malice. "Reckless disregard" is not measured by whether a reasonably prudent man would have published or would have investigated before publishing, but by whether the publisher in fact entertained serious doubts concerning the truth of the statements published. [*Grebner v Runyon*, 132 Mich App 327, 333; 347 NW2d 741 (1984) (internal citations omitted).]

Thus, "'[w]here it appears that the occasion is subject to a qualified privilege, the burden is upon the plaintiff to prove the untruth of the statements and actual malice.'" *Dadd v Mount Hope Church*, 486 Mich 857 n 1; 780 NW2d 763 (2010) quoting *Van Vliet v Vander Naald*, 290 Mich 365, 371, 287 NW 564 (1939). General allegations of malice are insufficient to establish a genuine issue of material fact." *Prysak*, 193 Mich App at 15.

Plaintiff claims that Viviano's statements regarding her alleged incompetency were "defamation per se" and, therefore, malice may be presumed. However, this Court has recently noted:

> Not all accusations of criminal activity are automatically defamatory. To put it simply, defamation per se raises the presumption that a person's reputation has been damaged. In that instance, a plaintiff's failure to prove damages for certain charges of misconduct would not require dismissal of the suit. Whether a plaintiff has alleged fault—which may require the plaintiff to show actual malice or negligence, depending on the status of the speaker and the topic of the speech—concerns an element separate from whether the plaintiff has alleged defamation per se. Thus, the trial court erroneously concluded that Cooley would not have to prove fault or other elements because the statements were defamatory per se. [*Thomas M Cooley Law School v Doe 1*, 300 Mich App 245, 268; 833 NW2d 331 (2013) (internal footnotes omitted).]

Therefore, in order to succeed on her defamation claim, plaintiff had to show actual malice. Because plaintiff failed to raise genuine issues of material fact, the trial court correctly granted summary disposition in defendants' favor.

A. INSULIN INCIDENT

Plaintiff complains that her trouble with Viviano started with the insulin incident. She claims that by questioning Viviano's judgment, Viviano subsequently waged a vendetta against plaintiff. Plaintiff received a "write up" from Viviano regarding the May 5, 2010, insulin incident:

> We arrived on the floor at 11[:]45 and the students are responsible to cover their patient's blood sugars according to their sliding scale. I informed Bridget G. her patient's blood sugar was 247 and we needed to cover it. Bridget G. was writing down information about her patient and asked if she could finish. I told her to finish and get with me as soon as possible. I began to pass medications with the other students and at 13[:]15 remembered Bridget had not given her insulin. I found Bridget G and informed her again covering a blood sugar is a priority and she failed to understand the importance of covering patients in a timely manner.

Plaintiff testified that, although Viviano indicated that plaintiff arrived at 11:45, work on that floor did not begin until 12:30. Plaintiff had arrived at 11:45, but had been assigned post mortem care, removing IVs, tubes, etc., from the deceased patient. As a matter of procedure, plaintiff could not administer care to a patient without first talking with the charge nurse and obtaining a report. Viviano told plaintiff that one of her patients needed insulin, which should have been administered at 11:00. Viviano instructed plaintiff to get the report from the nurse and give the medication. They did not discuss why the charge nurse failed to administer the insulin sooner. "That is why I did not give the medication, because I did not know, I had not received [a] report from that nurse. The nurse was in a meeting at the time, and I was instructed not to disturb her." In the meantime, plaintiff attended to other critical patients. Plaintiff did not believe that the patient for whom insulin was needed was in an emergency situation. Plaintiff did not believe she could give the patient insulin without first talking with the nurse, even if she knew his glucose level. "So instead I held off, waited to get the report before I administered any type of medication, and I questioned Anne Viviano's authority on this, and that is when the problems arise – arrived." Viviano insisted they administer the insulin and they did so together; plaintiff needed Viviano's authorization to access the medication. Ultimately, the patient received the medication two hours late. Plaintiff testified that following that event, Viviano became "very callous and cold and non-friendly toward me." Plaintiff did not regret her behavior and would have handled the situation in exactly the same way if given another opportunity – "I played the patient's advocate, and I wanted to make sure that I wasn't double dosing this patient."

For her part, Viviano testified that she believed that plaintiff arrived on the floor at 11:45 that day. She acknowledged that plaintiff was initially involved in postmortem care and did not dispute that plaintiff returned to the floor at approximately 12:30. Viviano explained that once a patient's blood sugar is determined "we usually try to cover them in a timely way," like within a half hour. Viviano learned that the patient's blood sugar was 247 from either the nurse or the tech who performed the test. Viviano did not say anything to plaintiff when she returned to the floor because it was plaintiff's responsibility to learn the information about her assigned patients. Viviano acknowledged that the standard of practice was that, except in an emergency situation, a

student first obtain a verbal report from the nurse before administering medications. However, a full report is not needed to cover blood sugar; it is safe to give insulin "if we know the blood sugar." "In this particular case the blood sugar was late and we had the information we needed to cover the patient." Viviano did not remember when the patient's blood sugar test was taken or by whom. She admitted that it was not plaintiff's fault that the nurse was unavailable. "At that time I just know that the patient wasn't covered. I don't know what time the aide did the blood sugar, if she, you know, charted it, any of that."

Viviano reported plaintiff "because we had discussed it." The problem was that plaintiff had been told that the patient needed insulin; the problem was not that plaintiff could not obtain the report. Viviano wanted the patient covered "[a]nd when she said to me let me finish what I'm doing I said take a few minutes and then let's go give it. I had to turn around and find Bridget she never got back with me." Viviano explained: "As her clinical instructor I would never instruct the students to do anything that might harm a patient, hurt a patient, and in this particular case the blood sugar needed to be covered and we talked about it. I think the blood sugar took precedence over a complete report from the nurse." In any event, Viviano did not recall plaintiff using lack of the report as the reason for the delay. There was never a discussion about it. Viviano admitted that the patient was not critical.

There was nothing defamatory about Viviano's statement regarding this incident. In fact, plaintiff acknowledges that the incident occurred and that she, in fact, failed to administer the insulin as requested. Her primary complaint is not that the statement was *false*, but that it was *incomplete*. A defamation claim must focus on the alleged defamatory statement, not the surrounding circumstances in which it was made. That plaintiff failed to administer the insulin was substantially true.

B. HIPAA VIOLATIONS

Viviano accused plaintiff of at least three different HIPAA violations for: 1) leaving a patient's medical record unattended in the room; 2) including patient identifier information on her assessments; and 3) copying patients' records while acting as team lead. In granting defendants summary disposition, the trial court acknowledged that, even if Viviano admitted that she may have been wrong in thinking some of plaintiff's conduct violated HIPAA, there was no evidence "presented that establishes that Ms. Viviano was actually incorrect or that she knew that she was incorrect. Accordingly, the Court is convinced that Ms. Viviano's belief that Plaintiff's actions had violated HIPAA can hardly be said to establish malice sufficient to overcome the privileged nature of the statement."

Viviano's May 5, 2010 write up included allegations that plaintiff had violated HIPAA by failing to protect a patient's medical record:

> I instructed her to chart what was given and put the medication sheet in the locked pull down cupboard as all the students were instructed to do. Bridget then was assigned to go to lunch. While she was gone I asked another student to get the medication sheet to review, but we were unable to locate it. We finally located the medication sheet on the floor in the patient's room.

> When confronted about the medication sheet Bridget G stated it was not her fault as the RN came into the room and placed clean linens on top of it. I then informed Bridget the medication record was her responsibility not the RN's and anyone could have entered that room and read private patient information which is a HIPPA [sic] violation.

In her later deposition testimony, Viviano testified that she helped plaintiff retrieve medication for the patient at a cabinet located outside of the patient's room. She told plaintiff "document it, lock it up and go to break." The record, as well as the medication, is always locked in the cabinet. "We're instructed to covet that med sheet." Viviano admitted that she sent other students to get plaintiff to take her break. Once they were gone, Viviano went to check the patient's record and it was gone. One of the students found it on the floor of the patient's room.

For her part, plaintiff testified that she had been treating the patient for bed sores when the patient grimaced, which was an indication of pain. Plaintiff confirmed with Viviano that they would give the patient pain medication. Plaintiff retrieved the patient's medication record and brought it back to the room. Subsequently, Viviano sent other students into the room at various times to advise plaintiff that it was time for her break. Plaintiff would have rather completed her task than take a break: "if I were able to finish this task that I was doing, this MAR would not have been left in the room."

Importantly, plaintiff does not deny that she, in fact, left the patient's medical record in the patient's room or that such conduct violated HIPAA. Instead, she once again provides an explanation or excuse for the situation, essentially blaming Viviano for making her take a break and not letting her complete the task. Again, Viviano's statement was substantially true.

Viviano was also upset when plaintiff, as team leader, gave the other students copies of patients' records. Plaintiff's copying of patient's medical records "raised a huge concern. . . . I couldn't believe that a student would copy peoples MAR's and that we would have two med sheets floating around the floor."

Viviano also accused plaintiff of violating HIPAA by using patient identifiers, such as the first name and room number on her assessments. She did not know whether writing the patient's name and room number on a board outside the room was a HIPAA violation.

> *Q.* Okay. One more thing. Plaintiff's counsel when he was examining you asked you about the assessments that we discussed . . . he asked you about those assessments and your statement that you think it was probably a HIPA[A] violation, you think it may have been a HIPA[A] violation, that the first names were included on those sheets. And he compared it, tell me if you remember this. He compared it to the boards in the hospital themselves in the patient's room?
>
> *A.* Yes.
>
> *Q.* That have the patient's first name on them, yes?
>
> *A.* Yes.

Q. And is it correct that using the patient's name on the board in the room is not a HIPA[A] violation as far as you know, in your opinion?

A. No.

Q. Okay. But you think it might be a HIPA[A] violation to have the patient's first name on the assessments, right?

A. I do.

Q. Okay. Why, what's the difference?

A. Because the assessments leave the hospital, they're in the student's bags, things happen. The boards stay in the patient room, nobody sees them. Your misplace things and that kind of stuff.

Plaintiff testified that she would use a patient's first name on their assessment forms but would not include any other identifying information, such as address or date of birth. Viviano considered this a HIPAA violation. Other instructors had provided the students with medical records that had the patients' names on them.

The director of the nursing program, Karen Grobson, testified that it would not be a HIPAA violation for an instructor to review a patient's medical chart because the instructor would have been a part of the patient's medical team at the hospital. If plaintiff showed a document with a patient's first name and room number on it to Viviano, Grobson did not believe it would be a HIPAA violation. "If the person she showed it to had a need to know or was part of her academic program, no." However, Grobson pointed out that Viviano's concerns were about plaintiff leaving a MAR unattended in a patient's room. Grobson neither agreed nor disagreed with Viviano's belief that certain conduct violated HIPAA.

Importantly, plaintiff has not shown that her conduct was *not* a HIPAA violation. Moreover, plaintiff failed to raise a genuine issue of material fact that Viviano's claims were malicious. Nothing in the record indicates that Viviano entertained serious doubts concerning the truth of the statements at the time they were made. Thus, even if incorrect, there was nothing in the record to show that Viviano's genuine belief that plaintiff's conduct amounted to HIPAA violations was malicious.

C. INCOMPLETE ASSESSMENT FORMS

On May 20, 2010, Viviano put forth a plan of action that emphasized the need for plaintiff to properly complete her assessments and charting responsibilities:

> For the remainder of the clinical rotation Bridget G. will be responsible to safely care for 2-3 patients, as the other students. The care includes a complete assessment, charting and passing medications on 1-2 of her assigned patients. It is expected she be prepared to give her medications by stating action and any other pertinent information (B/P, heart rate, need to be crushed, tubing changes, etc) needed. The above required actions need to be performed in a timely manner.

In her May 27, 2010 letter, Viviano indicated that plaintiff failed to achieve this goal:

> In pre-conference on the same day the students were instructed to turn in to me their assessments and charting in post conference. After reviewing Bridget G.['s] I found her assessment to be:
>
> a) Incomplete
>
> b) 2 out of 3 of her patients had no charting at all
>
> ***
>
> d) Bridget had the opportunity to push pain medication on one of her patients, but her assessment did not reflect that pain had been assessed at all or the effectiveness of the medication documented (A fundamental assessment)
>
> ***
>
> f) Safe patient care cannot be achieved when assessments are not done or [are] incomplete.

Plaintiff defended her incomplete paperwork. She testified that her failure to complete the paperwork was Viviano's fault:

> During this clinical she pulled me aside post conference and discussed one of my care plans with me. In the meantime all the other students sat around a table, completing their assessments within maybe 20 minutes. So after class, after post conference, she gathered all the paperwork, and as soon as I was done talking to her, I turned in my assessments, and I explained to Miss Viviano that mine were not complete. She knew I did not have the additional time that the other students had to complete theirs, and she told me I'm aware of that. I'm going to take them anyway or give them to me anyway, and I knew right then that she had fixed me right at that point, right when I was turning those papers in.

If she had been able to, plaintiff testified that she could have completed the paperwork in 10 minutes. Plaintiff knew that Viviano was going to use the incomplete work as a reason for failing the clinical.

For her part, Viviano testified that plaintiff was responsible for completing three assessments that day. Viviano acknowledged that she called plaintiff into meeting and that plaintiff did not receive the ten minutes her fellow classmates had to complete the assessments. Plaintiff turned them in and said they were incomplete, but Viviano found them to be virtually "blank." Viviano did not believe that 10 or 15 minutes would have been adequate time for plaintiff to complete the assessments. Viviano further testified that plaintiff failed to document that she gave Dilaudid or conducted a pain assessment. If these things were documented in plaintiff's personal notes, they were not transferred to the assessments.

Viviano acknowledged that she was wrong when she said that there was "no charting at all" when, in fact, there was "some" charting:

> *Q.* You made a false statement in your report that for two out of the three patients she had no charting at all, that was a false statement by you, correct?
>
> *A.* Correct.

The trial court acknowledged that Viviano may have been incorrect in stating that there was "no charting" on two of three patients, but "despite the fact that the patients did have some charting, it is clear from reviewing the assessments in questions [sic] that none of them are complete. Moreover the assessments were provided to the Judiciary Committee in connection with the appeal, thereby minimizing the impact of the partial false portions of the May 27, 2010 letter." Although plaintiff claimed that the alleged shortcoming in her charting of a patient's pain assessment was remedied by her noting such information in her personal notes, the trial court found that "it is undisputed that Plaintiff failed to 'document' this information in the assessment itself and that Plaintiff did not provide her notes to Ms. Viviano. Accordingly, while Plaintiff may have taken note of the information in question the fact remains that she failed to provide that information in the assessment and as a result Ms. Viviano's statements are true and cannot form the basis for Plaintiff's defamation claims."

Plaintiff does not dispute that the assessments fell far short of what was expected. Instead, she once again blames Viviano for her inability to complete the assessments. She also focuses on the fact that Viviano falsely claimed that there was "no charting." However, as the trial court aptly notes, Viviano's statements were substantially true. Plaintiff failed to chart key aspects of her patients' care. Moreover, the judiciary council was presented with plaintiff's assessment and could discern for itself whether Viviano's claims were accurate. There is simply nothing in the record to support plaintiff's contention that Viviano was obligated to seek out and review plaintiff's personal notes in order to get a full picture of plaintiff's assessments. We agree with defendants that plaintiff's failure to provide timely, complete patient assessments under real-life clinical conditions was entirely relevant to her ability to safely continue on in the clinical.

D. FAILURE TO ASK QUESTIONS

Viviano reported that if plaintiff was unsure of something she failed to ask questions, but Viviano could not recall a specific instance and "I don't recall why I wrote that." That Viviano could not specifically "recall" why she wrote that does not mean that plaintiff is entitled to a presumption that the statement was false or made maliciously.

E. SAFE PATIENT CARE

Ultimately, plaintiff failed Viviano's clinical because Viviano concluded that plaintiff could not provide safe patient care. Viviano's May 5, 2010 write up included concerns about plaintiff's general ability to safely care for patients:

> Bridget G. is having great difficulty caring for two patients. She has displayed her inability to organize, prioritize and provide SAFE patient care in a timely

> manner. Her written assessment (Concept Map) is another indication of problems with critical thinking.
>
> At this time Bridget G. is not safe to care for two patients. She experienced difficulty prioritizing and organizing their care, delegating, asking for help and working as a member of the team. Instructor met with Bridget G. and informed her she must perform safely in all aspects of care for the reminder [sic] of the clinical or would not be successful.

These concerns were echoed in Viviano's May 27, 2010 letter:

> Bridget is more than capable of performing tasks but is not meeting Objective 1 as evidence[d] by her inability as a 4th Term student to apply critical thinking skills and problem solving methods for decision making within the context of the nursing process. She continues to display a lack of organization, inability to prioritize or provide SAFE patient care.
>
> At this time Bridget G. is not safe to care for patients and will not be able to continue with the clinical rotation at Select. I instructed her to follow up with Karen G.

Viviano failed plaintiff because patient care "includes a complete assessment, charting, passing meds on one to two of her patients." There is nothing defamatory about Viviano's observations.

F. "FINGERLESS" PATIENT

Finally, plaintiff complains that Viviano falsely accused plaintiff of improperly medicating a patient. Plaintiff's concerns arise from Barbara Krygel's testimony that Viviano had expressed concerns regarding plaintiff's critical thinking skills – "She related a patient who didn't have any fingers and I'm not sure if she was even conscious and Ann was – and Bridget was either not medicating her appropriately or something to that effect." However, Krygel later retracted that testimony:

> *Q.* [by defense counsel] Can you tell me what that is?
>
> *A.* It's the paper on case management and actually, it's about the lady who – or man, I don't know who it is – who is missing fingers, I believe.
>
> ***
>
> *Q.* Does this refresh your recollection as to any conversation you'd have had with Anne Viviano regarding a fingerless patient?
>
> *A.* Now that I'm second thinking this, I might have just read it and Anne didn't even discuss it with me.
>
> *Q.* So you might have read that paper?

A. Um-hmm.

Q. So does that, then, refresh your recollection as to any mention you saw of a fingerless patient?

A. Yes.

Q. Okay. So then is it possible that if the paper doesn't – does not reference the improper giving of medication to a fingerless patient, that your prior testimony to plaintiff's – in response to plaintiff's counsel's questioning was incorrect?

A. Correct.

Thus, to the extent plaintiff complains about Viviano's defamatory remarks regarding a fingerless patient, there is no record evidence of such a statement.

Plaintiff appears to agree that that qualified immunity would normally apply, but in this case Viviano acted in bad faith, thus destroying any immunity. However, contrary to plaintiff's assertions, malice will not be presumed. *Thomas M Cooley Law School*, 300 Mich App at 268. Plaintiff was not relieved of her burden of raising a genuine issue of fact that defendants' conduct was malicious.

Plaintiff complains that the trial court erroneously held that the issue of bad faith or abuse of privilege was "for the trial court to decide." That is not true. The trial court specifically acknowledged that "Plaintiff is correct to the extent that she contends that the issue of whether the privilege was abused is generally left for the *jury*," however, "upon reviewing the record the Court is convinced that Plaintiff has failed to establish that a genuine issue of material fact exists with regard to whether the privilege was abused." Plaintiff was not relieved of her obligation to set forth a *genuine* issue of material fact.

In granting summary disposition, the trial court concluded:

> While Ms. Viviano acknowledged that some of her statements were not completely accurate, the content of the letter as a whole was substantially true where Plaintiff did not complete any of the assessments and failed to document the necessary information regarding the pain medication that she administered. Truth is a complete defense to defamation torts and the Michigan Supreme Court has held that statements that are substantially, although not entirely, true are sufficient to bar a defamation action where the false portion of the statement does not render the statements as a whole materially false. In this case, Ms. Viviano's statements, while not completely accurate, are substantially true. Moreover, the Court is convinced that even if not substantially true, a reasonable finder of fact could not conclude that such statements were malicious in nature. Accordingly, Plaintiff has failed to establish that a genuine issue of material fact exists with regards to her defamation claim and summary disposition in Defendants' favor is appropriate.

We agree with the trial court.

Defendants had an interest in maintaining the integrity of their nursing program and the proficiency of their students. Viviano's statements touched upon plaintiff's performance and her ability to provide safe patient care. Viviano's letters were not broadly disseminated, but were sent to Karen Grobson as director of the program. Each and every allegation was substantially true. There is simply no record evidence that Viviano made the statements with knowledge of their falsity or in reckless disregard of the truth.

III. INVASION OF PRIVACY/FALSE LIGHT, TORTIOUS INTERFERENCE WITH CONTRACT AND ADVANTAGEOUS RELATIONSHIP, AND CIVIL CONSPIRACY

Plaintiff argues that the trial court erred in granting summary disposition on the remainder of her claims. We disagree.

A. INVASION OF PRIVACY

The tort of invasion of privacy "'has evolved into four distinct tort theories: (1) the intrusion upon another's seclusion or solitude, or into another's private affairs; (2) a public disclosure of private facts about the individual; (3) publicity that places someone in a false light in the public eye; and (4) the appropriation of another's likeness for the defendant's advantage.'" *Dalley v Dykema Gossett*, 287 Mich App 296, 306; 788 NW2d 679 (2010) quoting *Doe v Mills*, 212 Mich App 73, 88; 536 NW2d 824 (1995).

This case involves the third theory – false light. "In order to maintain an action for false-light invasion of privacy, a plaintiff must show that the defendant broadcast to the public in general, or to a large number of people, information that was unreasonable and highly objectionable by attributing to the plaintiff characteristics, conduct, or beliefs that were false and placed the plaintiff in a false position." *Duran v Detroit News, Inc*, 200 Mich App 622, 631-632; 504 NW2d 715 (1993). "The actor must have had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed." *Early Detection Center, PC, v New York Life Ins Co*, 157 Mich App 618, 630; 403 NW2d 830 (1986). Therefore, "a claim for false light invasion of privacy cannot succeed if the contested statements are true." *Porter v Royal Oak*, 214 Mich App 478, 487; 542 NW2d 905 (1995).

In granting defendants summary disposition on this issue, the trial court noted: "Just as the substantial truth of the statements in question is a defense to Plaintiff's defamation claims, truth is also a defense to invasion of privacy claims." As previously discussed at length above, plaintiff has failed to set forth a genuine issue of material fact as to whether defendants acted with reckless disregard of the truth.

Moreover, summary disposition is proper where the communication is published to a small or specific group of individuals. See *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 387; 689 NW2d 145 (2004) ("Even construing Dr. Rogers's list of medical personnel as the 'public' to whom the information was broadcast, plaintiffs have not demonstrated a sufficient level of publicity . . ."); *Dzierwa v Michigan Oil Co*, 152 Mich App 281, 288; 393 NW2d 610 (1986) (the plaintiff's false light claim failed where the communications occurred only in the presence of other employees or, at most, a handful of office visitors); *Hall v Pizza Hut of*

America, Inc, 153 Mich App 609, 618; 396 NW2d 809 (1986) (false light claim failed where the actionable communication consisted of one telephone call); *Sawabini v Desenberg*, 143 Mich App 373, 381; 372 NW2d 559 (1985) (letter from physician to an attorney not disseminated to public in general or large number of people).

Plaintiff points to *Beaumont v Brown*, 401 Mich 80; 257 NW2d 522 (1977), overruled by *Bradley v Saranac Community Schools Bd of Educ*, 455 Mich 285 (1997), for the principle that one letter may form the basis for dissemination in an invasion of privacy claim, but *Beaumont* is inapplicable because it discussed only the publication requirement for invasion of privacy through public disclosure of embarrassing private facts. Here, plaintiff claims invasion of privacy through false light. Because the statements were substantially true and because the statements were not disseminated to the public in general or a large number of people, the trial court properly granted defendants summary disposition on this issue.

B. TORTIOUS INTERFERENCE WITH A CONTRACT AND ADVANTAGEOUS RELATIONSHIP

This Court has explained:

> In Michigan, tortious interference with a contract or contractual relations is a cause of action distinct from tortious interference with a business relationship or expectancy. The elements of tortious interference with a contract are (1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant. The elements of tortious interference with a business relationship or expectancy are (1) the existence of a valid business relationship or expectancy that is not necessarily predicated on an enforceable contract, (2) knowledge of the relationship or expectancy on the part of the defendant interferer, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resulting damage to the party whose relationship or expectancy was disrupted. [*Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83, 89-90; 706 NW2d 843 (2005) (internal quotation marks, citations, and footnote omitted).]

The former requires a contract whereas the latter does not. *Id.* at 90, n 2.

"One who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another." *Derderian*, 263 Mich App at 382 (2004) (internal quotation marks and citation omitted). Therefore, the party asserting a claim of tortious interference "must establish that the interference was improper." *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 383; 670 NW2d 569 (2003). "The 'improper' interference can be shown either by proving (1) the intentional doing of an act wrongful per se, or (2) the intentional doing of a lawful act with malice and unjustified in law for the purpose of invading plaintiffs' contractual rights or business relationship." *Id*. (Emphasis added).

In granting defendants summary disposition on this claim, the trial court noted: "While the Court is sympathetic to the fact that Plaintiff's expulsion has caused her to be ineligible for advancement opportunity at this time, including the opportunity to complete Baker's nursing program, it is convinced that Plaintiff has failed to present sufficient evidence, even viewed in a light most favorable to her, to establish that Defendants' actions were malicious or per se wrongful." Again, we agree. Viviano did not engage in an act that was wrongful per se. The statements were made in furtherance of her position as clinical director and as plaintiff's instructor. Nor did Viviano act lawfully with an improper purpose. As previously discussed, the letter was substantially true and there is no record evidence that Viviano acted maliciously.

To the extent plaintiff complains that defendants interfered with her relationship with Baker College, "[a] plaintiff, who is party to a contract, cannot maintain a cause of action for tortious interference against another party to the contract." *Derderdian*, 263 Mich App at 382.

To the extent plaintiff claims that defendants interfered with her continued employment at Beaumont, "an at-will employment contract is actionable under a tortious interference theory of liability." *Health Call of Detroit*, 268 Mich App at 92, quoting *Feaheny v Caldwell*, 175 Mich App 291, 302-304; 437 NW2d 358 (1989). However, the record is bereft of any evidence that defendants knew of this relationship or interfered with it in any way. Beaumont did not terminate plaintiff's employment; rather, Beaumont demoted plaintiff from nurse tech to nurse aide because of the fact that she was no longer on schedule to receive her nursing degree within the requisite two-year period. Defendants did not contact Beaumont about plaintiff. Her self-dismissal from the nursing program was not made public. Instead, it was plaintiff that informed Beaumont that she was no longer in a nursing program. Plaintiff's status, not defendants' actions, resulted in the demotion.

Regarding other potential future employers, plaintiff's brief on appeal confirms the shakiness of such a claim: "Defendant Viviano and Baker interfered with Plaintiff's current and prospective employment with Beaumont Hospital and other employment opportunities Plaintiff *may have had* as a *licensed registered nurse* when Viviano knowingly, maliciously, and in bad faith falsified the reasons for dismissing Plaintiff from the nursing program." But "[t]he expectancy must be a reasonable likelihood or probability, not mere wishful thinking." *Trepel v Pontiac Osteopathic Hosp*, 135 Mich App 361, 377; 354 NW2d 341 (1984). Plaintiff needed not only to pass Viviano's clinical, but also needed to complete her entire course of study and pass the state's licensing examination. Her status as a nurse was in no way guaranteed. Given the struggles that plaintiff had encountered, including the need to take the entrance examination twice and previously failing other classes, plaintiff has not shown a reasonable probability of future employment as a nurse.

C. CONSPIRACY

Finally,

> This Court has defined a civil conspiracy as a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means. In addition, to establish a concert-of-action claim, a plaintiff must prove that all defendants acted

> tortiously pursuant to a common design that caused harm to the plaintiff. For both civil conspiracy and concert of action, the plaintiff must establish some underlying tortious conduct. [*Urbain v Beierling*, 301 Mich App 114, 131-132; 835 NW2d 455 (2013) (internal quotation marks and citations omitted).]

Although plaintiff alleged separate, actionable torts, because those claims fail as a matter of law, plaintiff's conspiracy claim must also fail. *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384-385; 670 NW2d 569 (2003) aff'd 472 Mich 91 (2005).

IV. DESTRUCTION OF RECORDS

On appeal, plaintiff argues that she was entitled to a negative presumption as a result of defendants' failure to produce evidence. However, a "presumption" must not be confused with an "inference":

> [T]he function of a presumption is solely to place the burden of producing evidence on the opposing party. It is a procedural device which allows a person relying on the presumption to avoid a directed verdict, and it permits that person a directed verdict if the opposing party fails to introduce evidence rebutting the presumption.
>
> Almost all presumptions are made up of permissible inferences. Thus, while the presumption may be overcome by evidence introduced, the inference itself remains and may provide evidence sufficient to persuade the trier of fact even though the rebutting evidence is introduced. But always it is the inference and not the presumption that must be weighed against the rebutting evidence. [*Widmayer v Leonard*, 422 Mich 280, 289; 373 NW2d 538 (1985).]

"Generally, where a party deliberately destroys evidence, or fails to produce it, courts *presume* that the evidence would operate against the party who destroyed it or failed to produce it." *Hamann v Ridge Tool Co*, 213 Mich App 252, 255; 539 NW2d 753 (1995) (emphasis added). In *Trupiano v Cully*, 349 Mich 568; 84 NW2d 747 (1957) our Supreme Court explained:

> "It is a general rule that the intentional spoliation or destruction of evidence raises the presumption against the spoliator where the evidence was relevant to the case or where it was his duty to preserve it, since his conduct may properly be attributed to his supposed knowledge that the truth would operate against him." 20 Am Jur, Evidence, § 185, p. 191.

The full section continues, however:

> "Such a presumption can be applied only where there was intentional conduct indicating fraud and a desire to destroy and thereby suppress the truth. Moreover, while the spoliation of evidence raises a presumption against the person guilty of such act, yet such presumption does not relieve the other party from introducing evidence tending affirmatively to prove his case, in so far as he has the burden of proof. The spoliation or

> suppression of evidence is a circumstance open to explanation." [*Trupiano*, 349 Mich at 571.]

A party may rebut a presumption by presenting a "nonfraudulent explanation for its decision to discard" the evidence. *Ward v Consolidated Rail Corp*, 472 Mich 77, 85; 693 NW2d 366 (2005). Once it does so, "the initial presumption dissolve[s], but the underlying inferences remain to be considered by the jury." *Id.*

Barbara Krygel testified that she was the director of advising and assessment. She explained that documents in the grade appeal were provided to the judiciary council's members. Krygel did not have any records of the judicial panel as a matter of policy: "What happens at the end of a judicial appeal is that [vice president of student services] Lisa [Harvener] collects everything and shreds it. Any notes they have, any handouts they were given, and shreds it." This is done in an attempt to protect the student. Krygel was responsible for responding to plaintiff's discovery requests. When plaintiff requested the records from the judicial panel, Krygel contacted Harvener, who told her that no information or personnel notes were available because "we shred them." Krygel testified that she turned over all documents in her possession.

Lisa Harvener averred that she was the vice president of student services at Baker and regularly chaired the judiciary council for grade appeals. For plaintiff's grade appeal, as with all other such appeals, Harvener followed the Academic Appeal Process set forth in the student handbook. She distributed all material to the council members, which included any material submitted by plaintiff, as well as those submitted by the teacher. Only those materials and the class syllabus are provided to council members. The council members were permitted to take notes when considering the appeal, but Harvener did not specifically recall whether any of the members on plaintiff's case did so. After the council made its decision, Harvener collected all of the material and shredded them. Because student academic information was limited to members of the council, destruction of the material was necessary.

Defendants have sufficiently rebutted any presumption by presenting evidence that the material was destroyed as a matter of policy and was not an attempt to suppress the truth. As such, the trial court did not abuse its discretion when it refused to presumptively conclude that defendants were liable to plaintiff.

Nor was plaintiff entitled to an adverse *inference*. "A jury may draw an adverse *inference* against a party that has failed to produce evidence only when: (1) the evidence was under the party's control and could have been produced; (2) the party lacks a reasonable excuse for its failure to produce the evidence; and (3) the evidence is material, not merely cumulative, and not equally available to the other party." *Ward*, 472 Mich at 85-86 (emphasis added). The evidence was no longer under defendants' control and was not capable of being produced because it had been destroyed as a matter of policy. Defendants' explanation for their failure to produce the evidence was reasonable. And, as the trial court aptly noted, the evidence was not material in light of the fact that the witnesses involved were subject to deposition.

Moreover, defendants in this case were the moving party and the trial court was obligated to consider the pleadings, affidavits, depositions, admissions and other evidence in a light most

favorable to plaintiff. Plaintiff has not provided this Court with an example of the application of an adverse inference or presumption in the context of a motion for summary disposition.

Affirmed.

/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly
/s/ Michael J. Kelly